ORIGINAL

NO. 87-6796

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES A. FORD,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

DENNIS R. DUNN
Assistant Attorney General

Please serve:

DENNIS R. DUNN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499

QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to review the decision of the Supreme Court of Georgia finding that the Petitioner never properly under Georgia law factually or procedurally raised a claim in the trial court challenging the prosecutor's use of peremptory challenges pursuant to Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986)?

LIST OF PARTIES

1. Petitioner James A. Ford, presently under a sentence of death pursuant to the judgment of the Superior Court of Coweta County, Georgia.
2. The State of Georgia, Respondent and prosecutor in the instant case.

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OPINIONS BELOW

Petitioner seeks review by writ of certiorari of an opinion of the Supreme Court of Georgia issued on November 30, 1987, rehearing denied February 15, 1988, affirming the Petitioner's conviction and sentence after a remand of the case from this Court. Ford v. State, 257 Ga. 661, ___ S.E.2d ___ (1987).

PART ONE

STATEMENT OF THE CASE

Petitioner, James A. Ford, on October 24, 1984, was found guilty of the kidnapping, armed robbery, rape and malice murder of Sarah Dean, as well as of the burglary of the J & L Oil Company in Coweta County, Georgia. After the sentencing phase of Petitioner's trial, the jury found the existence of four statutory aggravating circumstances under Georgia law and recommended that the Petitioner be sentenced to death. In accordance with this recommendation, the trial judge imposed this sentence and the Petitioner appealed his convictions and sentences to the Supreme Court of Georgia, which affirmed the judgment of the trial court on October 29, 1985. Ford v. State, 255 Ga. 81, 355 S.E.2d 567 (1985).

As the Petitioner had raised allegations regarding the prosecutor's use of peremptory strikes, the Petitioner's first petition for writ of certiorari to this Court was granted. Ford v. Georgia, ___ U.S. ___, 107 S. Ct. 1268 (1987). The judgment of the Supreme Court of Georgia was vacated and this case was remanded to the Supreme Court of Georgia for further consideration of the case in light of Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. 708 (1987). Ford v. Georgia, supra.

On November 30, 1987, the Supreme Court of Georgia issued its decision regarding the case on remand, finding that the Petitioner at trial had never factually raised a claim of the type discussed in Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986), and that the Petitioner's subsequent attempt to raise a Batson-type claim was procedurally defaulted under Georgia law. Ford v. State, 257 Ga. 661, ___ S.E.2d ___, (1987).

The Petitioner now seeks a petition for writ of certiorari to review this decision by the Supreme Court of Georgia. Further facts will be developed herein as is necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASON FOR DENYING THE WRIT

A. THERE IS NO FEDERAL QUESTION PRESENTED HERE AS THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED AS A MATTER OF STATE LAW THAT THE PETITIONER HAD PROCEDURALLY DEFAULTED IN HIS CHALLENGE TO THE PROSECUTOR'S PEREMPTORY STRIKES IN THE PETITIONER'S CASE.

In this petition, the Petitioner alleges that this Court should grant a writ of certiorari to review a decision of the Supreme Court of Georgia finding that the Petitioner had, under state law, procedurally defaulted in his challenge to the prosecutor's use of peremptory challenges in the Petitioner's case. Respondent avers that the Supreme Court of Georgia in its application of state law properly determined that the Petitioner's claim was procedurally defaulted and therefore there is no federal question presented for the review of this Court in the instant case.

The facts surrounding the Petitioner's procedural default upon his claim pursuant to Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986), were noted by the Supreme Court of Georgia in its decision reaffirming the Petitioner's conviction, after remand from this Court. Ford v. State, 257 Ga. 661, ___ S.E.2d ___ (1987). On October 9, 1984, two weeks prior to the Petitioner's trial, the Petitioner filed a "motion to restrict racial use of peremptory challenges." Ford at 661-62 n. 1. In this brief motion, the Petitioner alleged that the prosecutor would, in his subsequent selection of a jury, exercise his peremptory challenges in a manner consistent with

a historic pattern of discrimination against blacks. Id. Therefore, the Petitioner requested that the trial court issue an order forbidding such actions by the prosecutor, in effect, requesting preliminary injunctive relief from the trial court on this issue. Id. The trial court denied this order. Id. at 662(4a).

Subsequently, on October 12, 1984, a pre-trial evidentiary hearing was held regarding the Petitioner's request for injunctive relief in the form of a court order. (10/12/84, H.T. 160-63). At this evidentiary hearing, the Petitioner's counsel stated in support of his request:

> Your Honor, in so far as evidence goes, I would just like to state in my place that its' (sic) been my experience, and the Court is aware that the district attorney and other assistant district attorneys have a history and a pattern when you have a defendant who is black, of using their per-emptory (sic) challenges to excuse potential jurors who are also black. We are requesting the Court to require the district attorney, if he does use his per-emptory (sic) challenges to excuse potential black jurors, to justify on the record the reason for his excusing them. His failure to do so we feel would evidence the fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.

Id. at 160-61.

The trial court subsequently denied this motion. Ford v. State, 257 Ga. at 662(4a).

On October 22, 1984, ten days after the hearing on the Petitioner's motion, the Petitioner went to trial. Extensive voir dire was conducted of the potential jurors. (T. 7-159). The jury was then struck. (T. 166). As the Supreme Court of Georgia factually noted, after the jury in the Petitioner's case was selected, no objection was raised as to the prosecutor's use of his peremptory strikes. (T. 166-70). When the trial court specifically asked Petitioner's counsel, "Mr. Edge, do you know of anything we need to take up?", Petitioner's counsel replied, "Your Honor, I don't think so . . . Yes, sir, we are ready." (T. 170).

When the issue of the prosecutor's peremptory challenges was next raised at trial, it was not raised by the Petitioner. (T. 270-71). Instead, at the noon recess on the second day of the Petitioner's trial, the trial court noted that the Petitioner had previously made a motion regarding the prosecutor's peremptory challenges and the trial court wished to clarify the record. Id. The trial court then proceeded to state factually what had occurred during the prosecutor's use of his strikes because, the court explained, "I just think that needs to be put in since that motion was made." (T. 271). This conference conducted after the beginning of the trial was not at the Petitioner's instigation or insistance in the form of an objection, but instead was an act of record-keeping on the part of the trial court.

In reviewing this factual scenario, the Supreme Court of Georgia made the following determinations. Initially, the Court noted that the Petitioner's original motion regarding the prosecutor's peremptory challenges was based on the law as it existed at the time under Swain v. Alabama, 380 U.S. 202 (1965), that is, that the Petitioner must show a pattern of systematic and historic exclusion of black jurors in criminal

trials within the circuit. Ford v. State, 257 Ga. at 661-62(4). After this motion was denied, and the Petitioner proceeded to trial wherein the prosecutor actually exercised his peremptory challenges, the Petitioner then made no contemporaneous objection to the composition of his jury as selected or to the actual exercise of the peremptory challenges. Id. at 663 (6b).

The Petitioner's original direct appeal had been affirmed by the Supreme Court of Georgia on October 29, 1985. Ford v. State, 255 Ga. 81, 96, 335 S.E.2d 567 (1985). The Petitioner had on direct appeal raised his Swain claim. Id. at 83(1). Subsequently, on April 30, 1986, this Court decided the case of Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986). Thereafter, the Supreme Court of Georgia recognized that this Court's decision in Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. 708 (1987), would provide a criminal defendant an opportunity to challenge the prosecutor's use of peremptory challenges in the defendant's own case if the case were on appeal or not yet final. However, the court also noted:

> But nothing in Griffith would warrant the extension of relief upon grounds never raised at trial. Indeed, all that Griffith dictates is that objections made - at trial - must be resolved under the Batson rule, whether or not they antedated the enunciation of that rule. (Note omitted) (Emphasis in original).

Ford v. State, 257 Ga. at 662(5).

As such, the Supreme Court of Georgia determined that the Petitioner's anticipatory motion seeking an order to prevent the prosecutor from allegedly misusing his peremptory

challenges in accordance with an alleged systematic pattern of discrimination could not be interpreted as the same claim challenging the prosecutor's actual use of peremptory challenges in the Petitioner's own case. See Ford at 662(5). Instead, the Supreme Court of Georgia determined that the Petitioner should have, after the prosecutor's use of his peremptory challenges and prior to the commencement of his trial, raised an objection to the actual use of the peremptory challenges in his case. Id. at 663-64(7, 8). The Petitioner's failure to have raised this claim was determined to have been a procedural default under Georgia law, and as the Petitioner had failed to show both cause and prejudice for his procedural default, the court declined to rule upon the Petitioner's Batson-type claim on its merits. Id.

Respondent notes that this interpretation of Georgia law involves no federal constitutional principle. As such, this Court has consistently adhered to a self-imposed principle that it will not review a state court judgment based upon an adequate and independent state ground, even if a federal question were involved or had been improperly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908), Fox Film Corporation v. Muller, 296 U.S. 207 (1935). In explanation of this policy, this Court has stated:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our

> power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after it corrected its use of federal laws, our review would amount to nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977).

This Court has also noted that the Due Process Clause of the Fourteenth Amendment does not establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. Spencer v. Texas, 385 U.S. 584, 563-64 (1967).

In the instant case, the application of the state procedural rule requiring a contemporaneous objection to the prosecutor's use of his peremptory challenges is appropriate and does not implicate any federal constitutional principle. While the Petitioner now pleads that the Supreme Court of Georgia did not specifically announce such a procedural rule until later decisions, Respondent submits that this did not relieve the Petitioner of the responsibility of preserving his claim. This situation can be directly analogized to that where a decision on a motion for change of venue has been deferred until the conduct of the actual voir dire of the jury, so that it can be determined whether such a change of venue would be necessary. In such a situation, once the voir dire had been completed, it would be incumbant on a criminal defendant at that time to renew his motion for a change of venue, provided that the voir dire actually supported

the need for such an action. This is not a novel principle of law to require a defendant to make such a preservation of an issue.

In the instant case, the record is devoid of any showing that the Petitioner was in fact unhappy with the actual trial jury selected in his case. The record does not demonstrate whether the Petitioner could have been satisfied with the selection of this particular trial jury, regardless of its racial composition, so that the Petitioner could have deliberately chosen to forego the preservation of a Batson-type issue. Given the posture of the record in this case, it was appropriate for the Supreme Court of Georgia to decide that the Petitioner's claim in this case was procedurally defaulted.

The Supreme Court of Georgia also properly determined that the Petitioner had not preserved a Batson-type claim by having previously raised an allegation pursuant to Swain v. Alabama, supra. The Petitioner's initial motion claimed that the prosecutor historically and systematically discriminated against blacks, and therefore, there was the possibility that the prosecutor would do the same in the instant case. However, in order to preserve his Batson claim in the instant case, the Petitioner would have to have alleged, after the selection of the jury, that the prosecutor in the exercise of his peremptory challenges did in fact discriminate against those particular jurors in this case. The Petitioner failed to do so. The Supreme Court of Georgia refused to permit the Petitioner to "bootstrap" this new Batson-type claim in this factual situation. Respondent also notes that, contrary to the Petitioner's position, this Court has in effect recognized that Batson presents a new issue for review of this Court by deciding that the Batson claim cannot be retroactively applied beyond those cases on direct appeal when Batson itself was decided. Griffith v. Kentucky, supra at 716; Allen v. Hardy, 476 U.S. ___, 106 S.Ct. 2878 (1986). As such, the Petitioner's raising of the Swain claim did not present the same issue as a Batson claim and fails to excuse the Petitioner from his procedural default under Georgia law.

Finally, Respondent notes that the Petitioner urges this Court grant certiorari in this case because of the pendency of Teague v. Lane, ___ U.S. ___, 42 Cr.L. 4197 (1988) in which this Court will have the opportunity to address the application of the Sixth Amendment in the context of a Batson-type challenge. However, Respondent submits that the pendency of Teague v. Lane, supra, should not affect the disposition of this case for the following reasons. If this Court determines that a petition for certiorari is not warranted because the Supreme Court of Georgia has properly applied state law in this context, the Petitioner's Batson-type claim is procedurally defaulted and this would include any portion of the claim which might be similar to that raised in Teague. If the Petitioner were to prevail upon this petition for certiorari, and Batson is found applicable to Petitioner's case, then a remand to the trial court would be necessary for further evidentiary development, regardless of the disposition of Teague. As such, Teague would present no basis for the granting of a petition for certiorari in this case.

CONCLUSION

Therefore, this Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there is no federal question for review by this Court as to the Petitioner's claims.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

William B. Hill, Jr.
WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

Dennis R. Dunn
DENNIS R. DUNN 234098
Assistant Attorney General

Please serve:

DENNIS R. DUNN
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3499

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Mr. Bryan A. Stevenson
Attorney at Law
185 Walton Street, N.W.
Atlanta, Georgia 30303

Mr. Charles J. Ogletree
Harvard Law School
208 Griswold Hall
Cambridge, Massachusettes 02138

This 16th day of May, 1988.

Dennis R. Dunn
DENNIS R. DUNN
Assistant Attorney General